IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 212 OF 2000

Premkumar @ Premnarayan Jagannath Varma, Convict Prisoner No.C-11098, Yerawada Central Prison, Pune-411 006.] .. Appellant

Vs

The State of Maharashtra.] .. Respondent

Mr. Abhaykumar Apte for the appellant.

Mrs. V.R. Bhosale, P.P., for the respondent-State.

CORAM: S.B. MHASE &
ANOOP V. MOHTA, JJ.

DATED: 23RD NOVEMBER, 2004

ORAL JUDGMENT. : [Per Anoop V. Mohta, J.]

1. The appellant-accused was charged, tried and convicted for the offence under Section 302 of the Indian Penal Code (for short "IPC"). Therefore, this Appeal against the order of conviction.

2. The appellant-accused has been convicted by the Additional Sessions Judge, Pune, by the impugned judgment and order dated 12th January, 2000, for committing double murder on 3rd March, 1996, between 5.00 and 5.30 p.m. at a grocery shop situated within

the area of Armed Forces Medical College, Wanwadi, Pune. The appellant, who was on duty at the relevant time and the place, suddenly started abusing the crowd and thereafter fired indiscriminately in the crowd and ran away. This resulted into the death of two persons viz. Gulshan Walchand Waghela and Radhelal and one Mr. Kamal Singh (PW8) was injured. The appellant was arrested by other colleagues. The complainant, after receipt of a phone call, had lodged the complaint (Exhibit-66). The investigating machinery moved accordingly and recorded the statements including statements of eye witnesses PW3, PW8 and PW10. The crime was accordingly registered under Section 302 and 307 of the IPC. The necessary Panchanamas were drawn, including Spot Panchanama, Arrest Panchanama and Inquest Panchanama. The Death Certificate and Post Mortem Report are part of the record. The blood sample report of the accused contained 0.147% w/v of ethyl alcohol. The accused pleaded not guilty and, therefore, claimed for the trial. The prosecution has examined, in all, 12 witnesses. No evidence was led by the appellant. The statement of the accused was recorded under Section 313 of the Criminal Procedure Code. The learned Sessions Judge, based on the proved prosecution case and documents, convicted the appellant under Section 302 of

the IPC. However, he was acquitted under Section 307 of the IPC.

3. Heard learned counsel appearing for the appellant, who basically contended that in view of the various contradictions in the statement of the witnesses, PW3 and PW10, on whom reliance has been placed by the prosecution, cannot be the basis for conviction. The prosecution witnesses are not natural witnesses and they are, in fact, tutored witnesses of the Police. Out of 11 witnesses, 3 witnesses were declared hostile, which includes the key witnesses i.e. witness No.3 and witness No.10. The evidence of the complainant was not recorded. The non-examination of the ballistic expert is also a material lacuna. The other witnesses nowhere support the prosecution case fully. In view of this, the order of conviction and sentence is bad and unsustainable. The learned counsel for the appellant has mainly relied on **(2003) 4, S.C.C., 128** [Suresh Chaudhary Vs. State of Bihar]. On the other hand, learned A.P.P. appeared for the State, resisted the above contentions of the appellant and submitted to maintain the order of conviction, as passed.

4. We have gone through the record of the case with the assistance of the counsel appearing for the respective parties. After taking into consideration the material on the record, as well as, the reasoning given by the learned Sessions Judge, we have found that the following circumstances/material dislinks the chain of circumstances of the prosecution case as sought to be placed and relied, to maintain the order of conviction in question. Therefore, it is difficult to maintain the order of conviction as passed by the learned Judge. The prosecution, according to us, failed to prove, beyond reasonable doubt, that the appellant had intentionally and knowingly committed the offence in question.

5. There is no dispute about the homicidal death of the two persons and injury to PW8, as the same has been duly proved by the prosecution through PW4 Dr. Milind Sharad Vable and the relevant Post Mortem Notes and Medical Certificates. The bullet injury and the resultant death is not in dispute as, even as per the doctor’s opinion - "Death was due to injury to the injured by the firearm."

6. In the present case, basic reliance was placed on the evidence of PW3 Goyal, PW8 Kamal Singh and PW10

Shrikant Mane. The learned Judge has observed in paragraphs 8 and 18 that PW3 Goyal and PW10 Mane nowhere stated that the accused had opened fire by which the two persons were injured and later on succumbed to the injuries. It is clear from the record that both these witnesses were declared hostile. There was no material cross-examination of these two witnesses. The learned Judge, however, relied upon the statement of these two witnesses, read with the other evidence, and convicted the appellant. PW8 Kamal Singh has also been relied upon by the learned Judge in support of the prosecution case.

7. It was PW3 Goyal in whose grocery shop the incident took place. He was in the shop along with his father Ramkumar and servant Shrikant Mane (PW10). The said Ramkumar was not examined by the prosecution. There is nothing in the evidence to show that the appellant had opened the fire. After hearing the sound of firing, he and his servant sat down on the ground to save themselves. They never saw outside. They were seated on the ground for about ten minutes. They only saw one injured person lying on the ground in front of the shop and another injured person was lying at some distance and both were bleeding. They came outside the

shop after some time. This witness has deposed that he, along with one Pramod Agarwal, had informed the incident to the Police Chowky. When they returned back, the injured were shifted to the hospital. This witness, however, was declared hostile as he was not supporting the prosecution case against the appellant-accused. This witness had also denied the material statement made to the Police, marked "A" and "I", at that relevant time. PW10, the servant of PW3, was also declared hostile as he did not support the prosecution case. This witness has also denied the statements made to the Police, marked "A". Both these witnesses nowhere supported the prosecution case as sought to be proved through these witnesses against the accused. It is, therefore, difficult to accept the prosecution case based on these two witnesses also. In this background, the conviction, based upon the evidence of these two witnesses, as relied by the prosecution and the learned Judge, is not correct. These two witnesses are difficult to believe and they nowhere support the case of the prosecution beyond reasonable doubt that it is the appellant alone and no one else, had committed the crime in question.

8. The other main witness of the prosecution was

PW8 Kamal Singh, working in Command Hospital, AMC, Pune, who was also injured because of the said firing. At the relevant time, as deposed, the accused was taking a round on the road, when this witness, along with Radhelal, were going towards the canteen to purchase beedis. There were 4 to 5 persons who were purchasing the goods from the same place/shop. This witness has deposed that he heard the noise of bullet from the back side and when turned around, saw that the accused was standing on the road. The said Radhelal was injured by the first bullet. A boy was hurt by the second bullet. This witness has deposed that he saw the bullet coming from the front side. He was also hurt by the third bullet, which struck on his lip, due to which his lip was torn. He was hospitalized for 15 days. This witness has deposed as under:

> "I saw the accused when he fired the second bullet from the rifle which was holding by him. I saw the accused when third bullet is struck to my lip. The accused before the Court is the same."

However, his cross-examination is full of contradictions, omissions and improvements, some of which are as under:

> "The boy was in front of me to whom the bullet was struck. I again say, the boy was behind

> me when the bullet was struck to him. Radhelal was in front of me and the dead boy was in front of Radhelal. Radhelal and deceased boy were near to each other and there was no gap between them. I have not seen the accused while taking the round on the road, while proceeding to canteen.
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> "Radhelal was behind me while purchasing the bidi. I have disclosed before the Police that Radhelal was behind me while purchasing the bidi. I have not narrated before the Police that Radhelel was inside the door and near the counter and the boy was in front of both of us. I am not able to say why portion marked "A" is recorded in my statement."
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> "I have narrated before the police that the bullet was strucked to my lip and the lip was torned. I am not able to say why it is not mentioned in my statement that the bullet was strucked to my lip and the lip was torned."

9. PW12 Supriya Balasaheb Patil was working as ACP at Wanwadi Police Division and had recorded the statements of eight persons, including of PW8 & PW10. Therefore, this witness has deposed that the portion marked "A" in the statement of PW10 is correct. This witness has attached the rifle, magazine and one live cartridge during the Panchanama. This witness has, in her cross-examination, stated that PW8 has deposed the portion marked "A". She has further deposed that PW8 had not stated in his statement before her that he heard the noise of bullet from the back side. He has also not stated that he saw the accused standing on the road when he turned his face towards the back side. She has

deposed further that PW8 had not stated specifically that his lip was torn by the bullet and he was admitted in the hospital for 15 days.

10. It is difficult to believe that this witness (PW8) could see the third firing/shot, as unless face is towards right or left, injury on the lip cannot be possible. He thereafter hid inside the counter. There is no evidence of blood stains on the spot of PW8.

11. The weapon used in this case was a rifle and not the pistol. PW6 has stated that only one bullet can be fired from the rifle at one time. There is no evidence to link the fact of refilling or loading the bullets one after other and then firing. It is a positive case of the prosecution that 10 bullets were handed over to the accused being Guard Commandant. As per the record, only one unused bullet, one used bullet and one empty cartridge was found. There is no evidence to reflect the time gap between the three bullets firing. The Spot Panchanama was drawn from 9.10 p.m. to 22.20 p.m. (PW1). This witness’s presence was not corroborated by any other witness, specially PW3 and PW10, who saw only two injured/deceased. PW7 has also heard the firing only of one bullet. PW9 has deposed

that the accused was not in a position to fire the bullet while passing. This witness has referred only to one round of firing.

12. The learned Judge has relied on the evidence of these witnesses in support of the prosecution and passed the order of conviction accordingly. We find that the testimonies of these witnesses are also quite shaky and raises various doubts. It is difficult to accept the whole testimony of these witnesses to convict the accused.

13. PW7 K. Krishnan Unni has deposed that at about 4.30 p.m. Guard Commandant Varma (accused) took the rifle and after loading the same, was taking round in front of the Sentry. He has deposed that the accused Varma was in an angry mood while taking the round. The accused was abusing and threatening all the sentry persons in anger. This witness heard only the noise of firing. The accused was brought later on. This witness has denied that the accused was taking the rounds, just like a mad person. This witness, therefore, cannot be relied to maintain the order of conviction, independently or otherwise.

14. Another prosecution witness PW9 Kariniar Honda Ayanna Pratap caught the accused from behind along with the others. However, in his cross-examination, this witness has stated that he had not narrated before the Police that he saw the accused while he was in a position to fire the bullet. He further deposed that the accused was not in a position to fire the bullet while passing.

15. PW11 Shailendra Raghunath Nagarkar, PSI, was attached to the Wanwadi Bazar Police Station. This witness has stated that at about 5.45 p.m., Rajkumar Goyal, the father of PW3 had informed about the firing and, therefore, he had reached at the spot. However, by that time, all the injured were taken to the hospital. This witness, thereafter, reported the incident to his superiors. He came to know, as informed; that the accused had fired bullets while he was under the influence of liquor and killed two persons and injured one; the accused was under the influence of liquor and was unable to talk and walk properly. The Arrest and Spot Panchanama were also drawn. This witness has sent the accused to Sassoon Hospital for examination and report. This witness has recorded the statement of PW3 Naveen and his father. This witness has deposed that

the portion marked "A", as narrated by PW3, was true and correct. This witness, therefore, has proved the prosecution case to the extent that the accused was under the influence of liquor at the relevant time, apart from the Spot Panchanama and/or the Inquest Panchanama and not further.

16. Another aspect which is very important in this matter is the non-examination of the ballistic expert. There is no dispute in this matter that the rifle, as well as, the seized bullets or cartridges were sent for analysis. No other bullets were seized from the surrounding area and/or the spot of the offence. PW7 has stated that he heard only one round of firing. PW8 stated that he heard three rounds of firing. The report shows that when the rifle was seized from the accused, there was only one live cartridge left. PW6 Chandran has deposed that rifle No.2482 was handed over to the accused with ten round of bullets. Therefore, out of 10 bullets, only one live bullet was found in the possession of the accused [verify]. There is nothing on the record to show as to what happened to the other 9 bullets and/or any seizure of such bullets. There is nothing on the record to show that the accused caused the death by using the rifle in question by firing the

bullets from the same. This missing link and basic lacuna also, according to us, raises various doubts in the prosecution case.

17. The learned counsel appearing for the appellant relied on Suresh Chaudhary (supra) and basically on the principle of omission or contradictions which affects the prosecution case, specially when the ballistic expert was not examined and other anti-catalyst and bullets were not seized or detected. The various infirmities, lapses and omissions on the part of the prosecution creates suspicion about the prosecution case and, therefore, based on the same, also prayed for acquittal in this matter. The reference was made basically to paragraph 11 and 12 of the said judgment. The extract of the same is as under:

> "11. PW13, the IO in the course of his examination stated that when he conducted the inquest at the place of the incident he found one .315 bore empty cartridge which he actually did not seize. However, he produced the same in the court without any mahazar in this regard. This empty cartridge was also not sent to the ballistic expert to establish the nature of the weapon from which this cartridge had been fired. It is relevant to note here that the three deceased persons have suffered multiple gunshot injuries and the failure on the part of the prosecution to collect the other pellets which had passed through the bodies of the deceased also casts grave doubt as to the actual place of the

incident."

18. We have also noted that no other colleagues of the accused, who were on duty along with the accused, were examined. PW7 was examined and he has also not supported the prosecution case fully. No colleagues of the accused has deposed to support the prosecution case that the appellant had committed the murder by firing the bullets from the same rifle. PW7 had only heard the noise of the bullets. The father of PW3, who had reported the incident to PW11, was also not examined, even though his statement was recorded. We have also noted that the informant was also not examined. The Panch witness PW2 was also declared hostile. Therefore, the conviction order as passed, on the testimonies of PW8 and PW3 & 10, who were declared hostile, is unsustainable for want of material to support the prosecution case.

19. The learned Additional Sessions Judge has rightly observed that the Investigating Officer has not taken pains to send the rifle and the recovered bullet to the Forensic Expert for examination and report. However, The learned Sessions Judge misread **1953, Cri.L.J., 1761 (S.C.)** [**Mohinder Singh s/o Inder Singh**

Vs. The State]. The extract of paragraph 10 of the judgment is reproduced as under:

> "10. In a case where death is due to injuries or wounds caused by a lethal weapon it has always been considered to be the duty of the prosecution to prove by expert evidence that it was likely or at least possible for the injuries to have been caused with the weapon with which and in the manner in which they are alleged to have been caused. It is elementary that where the prosecution has a definite or positive case, it must prove the whole of that case."
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> "The real position appears to be that the prosecution case cannot be said to be wholly proved but only partly proved if it is permissible to use such an expression. This Court, as was pointed out in - 'Pritam Singh v. The State', AIR 1950 SC 169 (A), will not entertain a criminal appeal except in special and exceptional cases where it is manifest that by a disregard of the forms of legal process or by a violation of the principles of natural justice or otherwise substantial and grave injustice has been done. It seems to us that the present case comes within the rule laid down, because the appellant has been convicted notwithstanding the fact that the evidence is wanting on a most material part of the prosecution case."

In the present case, according to us and, as submitted by the learned counsel for the appellant, the prosecution has failed to prove the injuries by examining the expert evidence and the fact that the injuries were caused by means of the rifle/weapon in question. The Apex Court has already observed that the prosecution has to prove the injuries by examining

experts when there is doubt about the same. The same principle is further elaborated in the case of Suresh Chaudhary (supra) also.

20. The cumulative effect of the evidence of all these witnesses, according to us, raises various doubts that the accused alone, and no one else, had committed the crime. The links are missing, specially in view of the fact that three main witnesses turned hostile. Therefore, such evidence cannot be relied, in the present facts and circumstances of the case, to convict the accused, specially when the other corroborative witnesses and/or evidence is also not supporting the prosecution case fully. Therefore, the reasoning given by the learned Additional Sessions Judge, in the present case, is not correct.

21. The learned Judge has relied on **1999 (2) All. Mah. Law Reports (Criminal), 1640** [**Nana s/o Bhima Bhujang Vs. The State of Maharashtra**]. Section 84 contemplates benefit of an insanity, to the accused only if same is duly proved. In the present case, the Medical Certificates on the record nowhere support the case of the appellant, whereby, the benefit as contemplated under Section 84 of the IPC can be

extended. In this regard, the reasoning given by the learned Sessions Judge is correct. However, that itself cannot be the reason to accept the whole prosecution story.

22. We have also noted that application under Section 329 of the Cr.P.C. was moved on behalf of the accused and the accused was sent for examination. The Report of the Medical Officer shows that the accused was within normal limits and was not suffering from mental illness. We have also noted that no defence of insanity was taken or suggested from the side of the accused. However, there is ample evidence to show that the accused was under the influence of liquor. We are in agreement with the view taken by the learned Sessions Judge so far as this aspect is concerned, that the accused is not entitled to get the benefit of the same, as already observed above. The question is - Whether the prosecution has proved, beyond reasonable doubt, the guilt of the accused.

23. Taking into account the evidence of all the witnesses, the material placed on the record by the prosecution, including the contradictions, omissions and lacunas, as referred above, we are of the view that the

conviction order and sentence, as awarded, is not correct. In the facts and circumstances of the case, the prosecution has failed to prove beyond reasonable doubt that the appellant and no one else had committed the crime in question by firing the bullets from the rifle in question.

24. We have noted that the accused was under the influence of the liquor and this fact was known and well within the knowledge of his other colleagues and Officers, and still he was posted to guard the place in question. If the accused was behaving madly and/or shouting and/or quarrelling with the other persons from the crowd, apart from his colleagues, in that case, it was the duty of his superiors to take care and/or control such person and/or remove such person from the duty. This is one of those cases where Officer on duty, for whatever may be the reason, takes stress or anger or under the influence of liquor fired indiscriminately, by using his official rifle, which was provided to him to protect the others, and that resulted into two casualties and one injury. There was no reason for the particular department to allow such a person to work as a guard in such a condition. The personnel of the concerned department of any such Government or Non

Governmental Organizations should be alert and keep watch to prevent such tragedies and menace. However, in the present case, as observed above, the prosecution has failed to prove the case beyond reasonable doubt and, therefore, we are interfering with the order of conviction and sentence passed by the learned Additional Sessions Judge.

25. There is merit in the Appeal. For the reasons recorded above, the impugned judgment and order dated 12th January, 2000, is quashed and set aside. The accused is acquitted. The accused be set at liberty forthwith, if not needed for any other offence.

[ANOOP V. MOHTA, J.] **[S.B. MHASE, J.]**

[srpasha@hc]